

UNITED STATES DISTRICT COURT  
DISTRICT OF NEW MEXICO  
ALBUQUERQUE DIVISION

ARRAY TECHNOLOGIES, INC.,	)	CASE NO: 1:17-CV-00087-JAP-LF
	)	
Plaintiff,	)	CIVIL
	)	
vs.	)	Albuquerque, New Mexico
	)	
COLIN MITCHELL, ET AL.,	)	Thursday, September 13, 2018
	)	
<u>Defendants.</u>	)	(9:35 a.m. to 11:24 a.m.)

DISCOVERY HEARING HELD TELEPHONICALLY

BEFORE THE HONORABLE LAURA FASHING,  
UNITED STATES MAGISTRATE JUDGE

APPEARANCES:

See page 2

Court Reporter:

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1 Albuquerque, NM; Thursday, September 13, 2018; 9:35 a.m.

2 (Hearing held telephonically)

3 (Call to Order)

4 **THE COURT:** Good morning. This is Laura Fashing, and  
5 we are scheduled this morning for a hearing -- a telephonic  
6 hearing on Array Technology, Inc.'s -- well, in the case of  
7 Array Technologies, Inc. V. Mitchell et al.

8 And we're specifically here to hear, for the purpose  
9 of considering Array Technologies, Inc.'s -- which we also call  
10 "ATI's" -- Motion to Compel, pursuant to Federal Rule of Civil  
11 Procedure 37(a), which is Document 192 on the docket sheet. I  
12 actually think it appears as Document 191 as well, but that may  
13 be a redacted version.

14 So, first, could I have appearances, please, from the  
15 Plaintiffs?

16 **MR. HOWELL:** Good morning, Your Honor. This is  
17 Michael -- this is Michael Howell. With me is Tyson Hottinger  
18 and also Jennifer Anderson on behalf of Array.

19 **THE COURT:** Okay, and then for the Defendants, who is  
20 present?

21 **MS. PRESCOTT:** Good morning, Your Honor. This is  
22 Katie Prescott from Fish & Richardson for the Defendant. With  
23 me is Zach Rhines, Sara Townsend, and Matt Jackson.

24 **THE COURT:** Okay, so this morning, we do have a court  
25 reporter here with us in the conference room.

1           And so, if you could, when you speak -- at least at  
2 the beginning of the hearing -- could you identify yourself,  
3 with respect to speaking, because we can't see you, obviously.

4           And the other issue that a telephonic hearing always  
5 has, is I can't tell by looking at you -- because I can't see  
6 you -- whether you want to speak.

7           So if you want to speak and I haven't called on you,  
8 please politely interrupt and let me know that you have  
9 something to say. Okay?

10           All right, so we are -- we're going to start with the  
11 Motion to Compel. There are only a few issues raised in that  
12 Motion to Compel.

13           But then, we've also received a couple of e-mails  
14 that I'd like to discuss as well. One, regarding 30(b)(6)  
15 deposition of ATI, that seems to be approaching rapidly. And  
16 then, also, a second e-mail sort of raising a few other issues  
17 that the Defendants -- I want to say we received that  
18 yesterday. But we'll deal with that a little later on in the  
19 hearing.

20           Okay, with respect to the Motion to Compel, the --  
21 one of the issues is ATI's Request for Production directed to  
22 NEXTracker; Request for Production Number 57, which asks --  
23 actually, let me get to the actual request. I want to make  
24 sure I get it accurate.

25           Request for Production Number 57 requests documents

1 related to any complaints from customers or potential  
2 customers, from June 2015, to the present, related to  
3 NEXTracker's projects, products, services, or customer service,  
4 including, but not limited to project delays, product defects  
5 or problems, and performance problems.

6           So I will tell you, I have reviewed both the motion,  
7 the Defendants' response, and ATI's reply. And it sounds like  
8 the -- the main argument has to do with whether or not the  
9 Defendant should have to -- or NEXTracker should have to  
10 produce complaints with respect to any project or product or  
11 only on projects that were overlapping in some way with ATI's,  
12 in the sense that -- I assume it would be projects where  
13 NEXTracker won the bid, as opposed to ATI.

14           So let me, first, hear from the Plaintiff. It's  
15 their motion. So whoever wants to speak for the Plaintiff,  
16 please go ahead.

17           **MR. HOWELL:** Thank you, Your Honor. This is  
18 Mr. Howell.

19           **THE COURT:** Uh-huh.

20           **MR. HOWELL:** And I appreciate the Court's review of -  
21 - of the briefing, obviously. And if it's -- if it's okay with  
22 the Court, I think these issues are somewhat related. The  
23 issue of documents related to the bid packages, as well as the  
24 RFP 57.

25           **THE COURT:** Okay.

1           **MR. HOWELL:** If it's okay with the Court, could we  
2 start with the bid package at issue and deal with that first,  
3 and then deal with the RFP 57?

4           **THE COURT:** Sure. Why don't you tell me how those  
5 are related.

6           **MR. HOWELL:** Sure. They -- they relate in the sense  
7 that the Defendants are advancing this argument about an  
8 agreement with respect to production of documents, and they're  
9 trying to apply this alleged agreement to basically both --  
10 both of these disputes.

11           And I think having some clarity about the -- the  
12 scope of that agreement will provide some insight into -- and  
13 rebuild the bid documentation issue as well as RFP 57.

14           **THE COURT:** Okay.

15           **THE CLERK:** Did somebody just join the conference?

16           **THE COURT:** Or leave.

17           **THE CLERK:** Or leave the conference?

18           **MR. HOWELL:** So this is Mr. Howell again.  
19 Mr. Hottinger is actually out of the country on another matter,  
20 and he's calling in. He's had kind of spotty reception, so he  
21 may have dropped off and --

22           **THE COURT:** Okay.

23           **MR. HOWELL:** -- he may rejoin.

24           **THE COURT:** Okay.

25           **THE CLERK:** Okay, thank you.

1           **THE COURT:** All right, so, Mr. Howell, please go  
2 ahead and -- so let's talk about, then -- I guess we can talk  
3 about it all together. And let me just make sure that I  
4 understand -- I want to make sure I understand where things  
5 stand with respect to the other request.

6           We're talking about Request for Production -- is it  
7 16, 17, and -- I was a little confused -- 16, 17, and 20; or  
8 16, 17, and 18?

9           **MR. HOWELL:** I believe it's 16, 17, and 20, Your  
10 Honor.

11           **THE COURT:** Okay, I just wanted to make sure. And  
12 those documents -- those are actually the result -- I haven't  
13 previously ruled on those particular Requests for Production,  
14 haven't I?

15           I thought that the parties came up with an agreement  
16 with respect to what would be produced. And now the current  
17 dispute is what exactly that agreement was. Do I have that  
18 right?

19           **MR. HOWELL:** I don't believe these specific requests  
20 have been -- have been presented to the Court. We -- we  
21 briefly touched on them at the last hearing. And if I recall,  
22 the Court said that they -- that -- that, effectively, we would  
23 wait on these until we address this third motion.

24           **THE COURT:** Okay.

25           **MR. HOWELL:** Because we ran out time at the second --

1 at the last hearing.

2 To give a little context, if I may, Your Honor --

3 **THE COURT:** Sure.

4 **MR. HOWELL:** I'll -- let me just back up. As the  
5 Court is aware, this case is about, among other things, trade  
6 secret misappropriation allegations from ATI against the  
7 Defendants, who for use and -- and disclosure improperly of  
8 ATI's trade secrets and confidential information.

9 And ATI is seeking to discover the scope of that  
10 discrimination and -- and the acquisition.

11 And here's what we do know, Your Honor, from some of  
12 the documents that -- have they produced, mainly by a  
13 Defendant's prior counsel.

14 We know that Mitchell was hired away from ATI by the  
15 Defendants. We know that Mitch -- that the Defendants knew  
16 that Mitchell's contract with ATI -- which included a non-  
17 disclosure provision and a non-competition provision -- were  
18 enforceable.

19 We know that the Defendants concealed Mitchell's  
20 employment from ATI. We know that the Defendant sought  
21 Mr. Mitchell's help to compete with ATI, and in response to the  
22 Defendants' inquiries of Mr. Mitchell, we know that  
23 Mr. Mitchell disclosed to Defendants ATI's benchmark pricing  
24 and we know that he disclosed information about ATI's sales  
25 strategy and, specifically, its value proposition. And all of



1 these things, ATI considers to be its trade secret and its  
2 confidential information.

3 And we're seeking to further discover additional  
4 facts related to this improper acquisition and disclosure and  
5 dissemination of ATI's information.

6 Now, Your Honor, we were, to -- to be candid, we were  
7 a little perplexed and kind of frustrated when we read the  
8 opposition, because it was the first time in this opposition  
9 that we had heard of this alleged agreement about production of  
10 bid packages.

11 We've been meeting and conferring about this issue  
12 for months. As the Court saw from the one snippet of an e-mail  
13 that the Defendants included in their opposition, these  
14 discussions began in January.

15 I have personally been involved in these discussions  
16 since May, and never once, Your Honor, have we heard from the  
17 Defendants about this alleged agreement.

18 Instead, what we've always heard is they're going to  
19 be searching for and producing documents and they're trying to  
20 gather documents. Then we heard they don't know what projects  
21 are at issue.

22 And there are three specific instances I'd -- I'd  
23 like to highlight for the Court, just to give a little bit of  
24 context here.

25 On June 18th, we had a meet-and-confer conference

1 with the Defendant, and we asked about the status of production  
2 of these bid documents; the documents related to the  
3 overlapping projects. And they claimed they did not know the  
4 projects that were at issue in the case.

5 And the reason for that, we -- I think we  
6 understand -- when ATI responded to some interrogatories that  
7 the Defendant had sent, ATI listed the projects at issue by the  
8 project name that ATI uses.

9 And the Defendants claim they didn't know what these  
10 projects were because they didn't know the naming convention,  
11 which has been an ongoing, kind of, struggle, if you will, for  
12 the parties to try to work together to figure that out.

13 And so one of the projects that the Defendant pointed  
14 out on this call on June 18th, was a project that ATI listed  
15 called, "The Swamp Box Project." And the Defendants claim they  
16 couldn't -- they didn't know what project that was.

17 So I actually pulled up the Defendants' salesforce  
18 data on this call and I did a quick control find, and there was  
19 one entry in the Defendants' salesforce data for Swamp Box.

20 So, again, we were a little perplexed, but we  
21 offered -- and for the sake of trying to move this ball forward  
22 and get the document -- to send them what we called a  
23 "Correlation Table." And that correlated ATI project names  
24 with what we believe to be the corresponding name that the  
25 Defendant chose.

1           And this e-mail was sent on June 19th, and it's  
2 Exhibit D, to Mr. Hottinger's declaration, it was attached to  
3 ATI's motion. And I believe the docket number there is 192-4.

4           And in that e-mail, on June 19th, I wrote -- I don't  
5 know if the Court is there -- but I wrote, "Pursuant to several  
6 of our Requests for Production of documents, please produce  
7 NEXTracker's complete file of the document associated with each  
8 of the projects listed in the attached.

9           "These documents should include, but not be limited  
10 to, all bid documents, both packages, financial information,  
11 profitability analyses, and internal and external  
12 communications about these projects."

13           The Defendants, in response, they never objected and  
14 they never said, "Whoa, this is outside the scope of our  
15 alleged agreement that we reached in January. We said we're  
16 only going to produce quotes, requests for proposal, and  
17 contracts."

18           In fact, what they did, Your Honor -- and we had a  
19 subsequent call the following week. And they asked -- they  
20 thanked us for sending this list, and they asked if we could  
21 send a second list for the projects that ATI identified in  
22 response to Interrogatory Number 10.

23           Now, this is a separate set of projects. The first  
24 list -- the January 19th e-mail -- was in response to  
25 Defendants' request that we send them a list of projects that

1 we contended that we lost to them. And that was in what we  
2 included in response to Interrogatory Number 5 from the  
3 Defendant.

4 And so, on June 30th -- and this is the following  
5 exhibit; it's Exhibit E, to Mr. Hottinger's declaration. We  
6 sent a second list, and we, again, asked -- again, and we said  
7 we trust that this list, like the last one we sent, will allow  
8 Defendants to produce bid documents, quotes, correspondence,  
9 internal and external, et cetera, for each of these projects  
10 and for the projects identified in the correlation table sent  
11 previously.

12 Again, we never got an objection. We were never  
13 notified that they believed that there was this alleged  
14 agreement that only obligated them to produce contracts,  
15 requests for proposal, and quotes.

16 We had then, again, spoke to them on August 3rd,  
17 before we filed this motion. And, again, we never heard this  
18 new theory of what this alleged agreement meant.

19 And so when we get to this opposition, we -- we were  
20 surprised and we -- we looked at this e-mail that they cited --  
21 that they, again, never raised previously. And, as we argue in  
22 the reply, it -- it doesn't -- it does not set forth any  
23 agreement about what constitutes -- the one e-mail they -- they  
24 attach in their -- or they included in their opposition does  
25 not set forth what bid packages mean.

1           And if we actually look at the e-mail, Your Honor,  
2 the full e-mail -- and this is attached to Ms. Prescott's  
3 declaration. And that's Docket Number -- I apologize -- 2042,  
4 I believe. It's Exhibit 1 to her declaration. The full string  
5 of that e-mail is there attached.

6           And if -- if we look at the very first e-mail on the  
7 string -- this is on the third page of, I believe, Docket 2042.  
8 It may be 2032. I'm -- I think it might be the redacted  
9 version again.

10           But it says -- the very first e-mail on the string is  
11 from Ms. Betty Chen. She's an attorney at Fish & Richardson  
12 for the Defendant. And on the fourth line down, she said,  
13 "NEXTracker also agrees to produce additional responsive  
14 documents, including bid packages, by January 29th.

15           And in response, Mr. Braithwaite -- down at the  
16 bottom of page 2 -- who was -- is an attorney for ATI. He  
17 works with me here at our firm. He says, in the very first  
18 paragraph, "Your recitation is generally correct, though it  
19 would probably be beneficial to be more precise if your purpose  
20 is to make a written record."

21           And in the third paragraph, he said, "With respect to  
22 document production responsive to RFP, ATI agreed to produce  
23 outstanding documents in accordance with its responses to  
24 NEXTracker's first set of RFPs, including documents related to  
25 ATI project bids.

1           That -- that's what we agreed; documents related to  
2 the project bid. And that's how ATI has conducted itself in  
3 this case. It has produced documents related to the project  
4 bid.

5           The e-mail that the Defendants include in their  
6 opposition, the snippet that they put in, that says nothing  
7 about what bid packages constitutes.

8           What it talks about is how there are so many entries  
9 in salesforce data that we're going to try to limit the --  
10 the -- the projects at issue by only those on which ATI and  
11 NEXTracker were competing. And for those projects, the parties  
12 would agree to produce the documents related to the project  
13 bids.

14           And that's -- that's -- from the e-mail string,  
15 that's what happening. The original agreement here was to  
16 produce documents by January 29th -- in Ms. Chen's e-mail.

17           ATI then started trying to compile that based on the  
18 salesforce data and contacted Ms. Chen -- that's Tyson's e-mail  
19 on the second page of that exhibit.

20           And that's when this call was had where Tyson  
21 proposed, and they discussed -- Tyson -- that he discussed,  
22 comparing the projects and making a list of the competing  
23 projects and exchanging that -- on January 29th.

24           That's what this is about. There was never an  
25 agreement to only produce quotes, requests for proposal, and

1 contracts. And the requests for proposal -- I should mention,  
2 Your Honor, those aren't even NEXTracker or ATI documents.  
3 They're from third parties. That's what ATI and NEXTracker  
4 respond to with a -- with a quote or the information about  
5 their product.

6 So there was never an agreement to limit bid packages  
7 to be only, quotes, contracts, and requests for proposal.

8 **THE COURT:** Can I interrupt you just real quick, and  
9 ask you, Mr. Howell --

10 **MR. HOWELL:** Sure.

11 **THE COURT:** Was there an agreement to limit to  
12 overlapping projects?

13 **MR. HOWELL:** There was an agreement to limit the  
14 production of documents related to the bid to the overlapping  
15 project; that's correct. And that agreement was reached in  
16 January.

17 **THE COURT:** Okay.

18 **MR. HOWELL:** This is how it relates to the RFP 57  
19 issue, Your Honor.

20 **THE COURT:** Okay.

21 **MR. HOWELL:** In January, when we reached that  
22 agreement, that was with respect to these documents that --  
23 that related to bid and -- and the overlapping projects -- the  
24 internal correspondence.

25 That the Court, hopefully, can see from the -- the

1 exhibits that we attached to our reply, there is a huge  
2 difference between internal deliberations and a contract. It's  
3 effectively a form contract. And that's what ATI has been  
4 given to work with in this case.

5           The RFP 57 issue, Your Honor, is separate. That  
6 issue was in response to the Defendants advancing this defense  
7 that they are gaining market share; not because of trade secret  
8 misappropriation or the other causes of action that ATI has  
9 alleged, but because they're better.

10           And they have advance -- they advanced this theory --  
11 I believe it was in July was the first we had seen it -- or  
12 June, I'm sorry. It was in June.

13           And that's when we served the RFP 57. Because we are  
14 seeking to discover, to test the -- the merits of that new  
15 theory they were advancing to determine just how meritorious it  
16 might be so we could have something to rebut this new theory.

17           And that's when we served RFP 57. That was after  
18 this so-called agreement. The agreement was -- did not  
19 contemplate that sort of defense at the time.

20           And, more importantly, Your Honor, as we said in the  
21 reply, obtaining information about complaints just about the  
22 competing projects isn't overly helpful because those projects  
23 were already won by NEXTracker.

24           We're looking for general market perception and  
25 complaints to NEXTracker from EPCs that would -- that would go



1 to the issue of how Defendants are truly competing with ATI.

2 And there's two other issues I want to raise, if I  
3 may, Your Honor, about RFP 57.

4 **THE COURT:** Okay, go ahead.

5 **MR. HOWELL:** The Defendants have sent a subpoena --  
6 and we attached this to our reply -- to an ATI former employee,  
7 Denise Hugo, and in that subpoena, they are effectively  
8 asking -- not limited by overlapping projects -- for the same  
9 document that they are objecting to here -- in RFP 57. That's  
10 the first point. They can't have it both ways.

11 The second point, Your Honor, is that two days ago,  
12 the Defendants made a production. And in that production --  
13 which consists, I have to say, mostly of things like shipping  
14 labels and shipping receipts and bills of lading for the  
15 overlapping projects, because they are apparently trying to  
16 produce everything but internal and external communications,  
17 the other -- the other relevant documents that we're seeking in  
18 this motion.

19 But they also produced a number of documents that  
20 relate to, generally, NEXTracker's influence and presence in  
21 the market, including customer reviews of the NEXTracker  
22 system.

23 These are not specific reviews about the overlapping  
24 projects. They are more broad, market-based feedback and  
25 customer reviews about NEXTracker's product.

1           They include a video discussing agricultural  
2 installation, the amount of money saved through NEXTracker,  
3 installed their monitoring system.

4           They have a video from an EPC about -- I'll give you  
5 a quote:

6           "TrueCapture is an intelligent, self-adjusting  
7 tracker control system that increases typical PV power plant  
8 energy by 106 percent."

9           I won't read the whole thing. But you -- you get the  
10 idea. They're -- they are selectively choosing what to  
11 produce, and they have now produced general information about  
12 the benefit to their system that they are presumably going to  
13 try to advance to demonstrate the market feedback, generally,  
14 about how great their products are.

15           And they're resisting providing any market  
16 information about complaints of their -- of -- about their  
17 projects, except for these overlapping projects -- which they  
18 haven't even agreed to do that.

19           So that would be our response to the RFP 57 issue,  
20 Your Honor.

21           **THE COURT:** Okay, Ms. Prescott, will you be speaking  
22 for the Defendants or --

23           **MS. PRESCOTT:** Yes, I --

24           **THE COURT:** -- someone else?

25           **MS. PRESCOTT:** -- will, Your Honor.

1           **THE COURT:** Okay.

2           **MS. PRESCOTT:** And I'm going to set aside for now the  
3 characterization of the (indisc.) history surrounding the  
4 January agreement and just focus in on Request for Production  
5 Number 57, while we turn to the other Request for Production.

6           I would like to revisit that, however.

7           **THE COURT:** Okay, go ahead.

8           **MS. PRESCOTT:** Request for Production 57 seeks  
9 documents related to any complaint from any customers or  
10 potential customers for more than the past three years.

11           The parties have agreed in the case that there is a  
12 limited set of projects that are at issue. I don't think  
13 there's any dispute on that, separate and apart from the  
14 January agreement.

15           For purposes of the discovery, NEXTracker has been  
16 accepting ATI's set of projects that are in.

17           This Request for Production 57 is untethered, both  
18 from that set of projects and from the set of customers that  
19 are involved in those projects, whether it's been complaints  
20 from any customer.

21           The articulated relevance that ATI has asserted is  
22 that they need complaints from all customers to get at our  
23 general market perception and our -- the NEXTracker's market  
24 reputation.

25           The problem is, is that the information they are

1 seeking, individual complaints submitted by NEXTracker  
2 customers to NEXTracker, are simply not probative of that  
3 general marketed perception and reputation.

4           These aren't things that are then forwarded on and  
5 shared with others so that the market can learn about these  
6 issues.

7           There are, however, other documents that are  
8 probative of that. There are commission surveys about customer  
9 perceptions. We've produced that. One of those was attached  
10 to my declaration in support of the opposition brief.

11           Additionally, there are market reports that could be  
12 probative of that. Several of those have produced in the  
13 course of this litigation in response to other requests; for  
14 example, requests about (indisc.).

15           We did go and do a search, specifically, for reports;  
16 an analysis directed to the reputation of NEXTracker and  
17 NEXTracker's product in the market.

18           But Request for Production 57, as it was propounded,  
19 is much broader than that. It's just seeking complaints from  
20 all customers.

21           This information is highly burdensome to collect,  
22 given its marginal relevance to general market perception. And  
23 customer feedback is received through numerous channels:  
24 Through support, through technical contacts, through sales.

25           And this request is unlimited in geography, it's

1 unlimited in customer types. It's not just limited to EPCs, as  
2 Mr. Howell asserted. It's not limited to the customers that  
3 are at issue in this overlapping set of projects. And so  
4 Request for Production Number 57 is untethered.

5 We're happy to make a search for market reports and  
6 analyses related to our market -- NEXTracker's market  
7 reputation and NEXTracker's product market reputation. But the  
8 general request of -- Request for Production Number 57 is  
9 simply too broad.

10 **THE COURT:** Let me ask Mr. Howell, where -- where is  
11 it that the Defense appears -- I mean, you assert this in your  
12 motion that ENEX -- or NEXTracker contends that it has taken  
13 market share because NEXTracker is more innovative, has better  
14 products, and has better customer service.

15 Where does that come from? Is that in there?

16 **MR. HOWELL:** Yeah, let me -- let me get the docket  
17 number for you. I believe it's in our -- in our opening  
18 motion.

19 **THE COURT:** No. But does that -- where are they  
20 asserting that defense? In their answer or somewhere else?

21 **MR. HOWELL:** No. I don't believe it was in their  
22 answer. It's been in the -- it's a theory there they are  
23 advancing, and it was first advanced in their opposition memo  
24 to our first Motion to Compel, I believe.

25 **THE COURT:** Okay.

1           **MR. HOWELL:** That -- that's -- again, that's why the  
2 January alleged agreement -- I mean, this wasn't even  
3 contemplated at the time.

4           **THE COURT:** Okay.

5           **MR. HOWELL:** So that's the issue. And, like I said,  
6 they're -- they're -- they're producing general market  
7 information and -- and individual quotes and things from EPCs  
8 and developers, reportedly to advance this theory, and -- and  
9 they don't want to give the flip side of that. And that's the  
10 problem.

11           **THE COURT:** And, Ms. Prescott, do you agree that  
12 you're advancing this theory that you have better customer  
13 service than ATI?

14           **MS. PRESCOTT:** Your Honor, ATI is arguing that  
15 NEXTracker is winning in projects because it has allegedly made  
16 use of ATI's trade secrets.

17                   We are advancing and showing that there were other  
18 reasons why NEXTracker won those projects.

19                   And, yes, those reasons include our customer service  
20 and our product is best.

21           **THE COURT:** All right.

22           **MS. PRESCOTT:** However, that is with respect to  
23 particular customers and particular projects that are at issue  
24 here in the case.

25                   And so, to the extent that customer feedback is

1 relevant, it is those customers that are the people responsible  
2 for those projects that are at issue here. Not all customers.

3 **MR. HOWELL:** And, Your Honor, this is Mr. Howell. If  
4 I may, this -- this is the first we've heard that they're  
5 limiting it to that.

6 It was not limited that way in their opposition to  
7 our first Motion to Compel. And their more recent production  
8 does not seem to be limited to that either.

9 **MS. PRESCOTT:** Your Honor, I wasn't making a  
10 representation as to how we were limiting our production. I  
11 was making a representation as to what could arguably be  
12 relevant in this case.

13 And that's the customers and the projects that are at  
14 issue. Not every project; not every customer that could be  
15 theoretically here.

16 **MR. HOWELL:** And, Your Honor, this is Mr. Howell. If  
17 I -- if I may respond?

18 **THE COURT:** Okay.

19 **MR. HOWELL:** Your Honor --

20 **THE COURT:** You do have to give me a minute to think.  
21 So every time I pause --

22 **MR. HOWELL:** No, sorry.

23 **THE COURT:** Sometimes I am just thinking. So go --  
24 but go ahead, Mr. Howell.

25 **MR. HOWELL:** I was just going to reiterate. I mean,

1 I understand what Ms. Prescott's saying now. But what she's  
2 saying is not -- it's not consistent with what they're  
3 producing and what they're actually saying -- and the theory  
4 they're advancing.

5 They can't say, we're limiting -- the only projects  
6 that are relevant are the overlapping projects and  
7 simultaneously say they're winning market share by being better  
8 and producing documents that don't relate to overlapping  
9 projects and instead relate to general market feedback.

10 That -- those are inconsistent to this.

11 **MS. PRESCOTT:** Your Honor, if I could respond, based  
12 on the scope of our production thus far?

13 **THE COURT:** Sure.

14 **MS. PRESCOTT:** So the scope of our production, as far  
15 as not being in response to our Request for Production Number  
16 57, it's been in response to other requests. And the material  
17 that we have produced related to customer feedback is marketing  
18 material, stuff that is publicly available on our website.

19 What they are seeking here in Request for Production  
20 Number 57 is all documents related to any complaints,  
21 individual e-mails that are not going to be put out on websites  
22 that will impact NEXTracker's general market perception and  
23 market reputation.

24 That's what that issue as to whether we provide  
25 customer service and whether customer -- what customers --



1 perception of that customer service.

2           The documents that are relevant to that, we are  
3 willing to produce. Those are market reports and surveys. But  
4 it is not individual e-mails from all customers being sent to  
5 NEXTracker's service department that, when parts are two days  
6 late.

7           **THE COURT:** All right. Hang on just a second.

8           All right, I -- with respect to the Request for  
9 Production 57, it does seem to me that if -- if the Defendant -  
10 - if NEXTracker is essentially going to present a defense that  
11 the reason that their market share has increased is because  
12 they have better customer service than ATI, then certainly  
13 complaints -- customer complaints are relevant. The question  
14 is, to what extent?

15           And so I'm just going to look at Request for  
16 Production Number 57, specifically. It requests documents  
17 related to any complaints from customers or potential  
18 customers.

19           I think complaints from potential customers is not  
20 relevant. So we're going to -- I'm not going to order that you  
21 produce any complaints from potential customers.

22           And then it's from June 2015 to the present, which  
23 seems like a relevant time period because -- well, it's about a  
24 year before Mitchell was hired. So I think that that -- the  
25 argument there is you want to see pre-Mitchell and post-

1 Mitchell, in terms of customer service. So that time period  
2 seems okay.

3 With respect to NEXTracker's projects, products,  
4 services, or customer service, including, but not limited to  
5 project delays, product defects or problems, or performance  
6 problems --

7 All right, so let me just talk -- think for a minute  
8 about whether or not it should include all projects or only  
9 projects -- basically, that NEXTracker won over ATI.

10 **MS. PRESCOTT:** Your Honor, this Katie Prescott. And  
11 I know you want to take an opportunity to -- I just want to  
12 clarify that the projects at issue are not limited to projects  
13 that NEXTracker won.

14 In certain circumstances, ATI has included projects  
15 where NEXTracker and ATI were competing. ATI won. ATI alleges  
16 that it had to reduce its profit because of NEXTracker's  
17 sitting strategy.

18 **THE COURT:** Right.

19 **MS. PRESCOTT:** I just wanted to clarify that point.

20 **THE COURT:** Ms. Prescott --

21 **MS. PRESCOTT:** And then --

22 **THE COURT:** Just a second. Before we go to the  
23 second -- your second point, since I'm limiting it to only  
24 customers, I'm assuming that if you don't win the bid, they are  
25 not your customers; is that right?

1           **MS. PRESCOTT:** Not necessarily, Your Honor. Because  
2 customers have more than one project.

3           **THE COURT:** Okay.

4           **MS. PRESCOTT:** And NEXTracker may win one project and  
5 lose one project; ATI may win one project and lose one project  
6 for the same customer.

7           So I think if we're focused on reputation here, what  
8 the issue is, is the potentially overlapping customers, not all  
9 projects. I think we really need to be more focused on the  
10 customer identity here and the overlap in customers in the  
11 project at issue.

12           **THE COURT:** All right. Mr. Howell, what's your view  
13 on that idea?

14           I mean, again, I'm -- I'm trying to limit it to a  
15 reasonable production that will get you what you need, but  
16 isn't overly burdensome.

17           **MR. HOWELL:** I understand, Your Honor. And -- and I  
18 think we can agree to that with the understanding that  
19 customers will include both EPCs and developers.

20           Because Ms. Prescott is correct. And that's one of  
21 the reasons why we want this. But an EPC may -- may bid on  
22 many projects --

23           **THE COURT:** Okay, tell me --

24           **MR. HOWELL:** -- and various developers.

25           **THE COURT:** -- what an "EPC" is before you go --

1           **MR. HOWELL:** I'm sorry. You got it. An EPC stands  
2 for "Engineering Procurement and Construction."

3           And EPC is kind of like a general contractor that a  
4 developer or an owner of a project will hire to solicit bids  
5 for trackers and modules and inverters.

6           And then the EPCs often build the projects as well.  
7 Sometimes developers do that all in-house; sometimes developers  
8 hire EPCs to do this as well.

9           So ATI markets its product to both EPCs and  
10 developers. And I believe NEXTracker does as well.

11           **THE COURT:** Is that accurate, Ms. Prescott -- just  
12 that last sentence -- that you market to both --

13           **MS. PRESCOTT:** It depends on the particular project.  
14 Whether the --

15           **MR. HOWELL:** I'm sorry --

16           **MS. PRESCOTT:** -- the interaction is a type of EPC or  
17 (indisc.).

18           **MR. HOWELL:** Didn't hear any of that.

19           **THE COURT:** Okay, can you repeat what you said? We  
20 couldn't hear it.

21           **MS. PRESCOTT:** Apologies. Whether NEXTracker is  
22 marketing itself to the EPCs or developers depends on the  
23 particular project.

24           But looking across projects, yes, NEXTracker does  
25 market itself to those categories.

1           **THE COURT:** Okay, so I'm going to limit Request for  
2 Production Number 57 to documents related to any complaints  
3 from customers, which we will understand to include both EPCs  
4 and developers, from June 2015, to the present, related to --

5           And then help me here. Is it going to be -- and I  
6 don't know exactly what to call this body of projects. Is it  
7 "overlapping projects," Mr. Howell?

8           **MS. PRESCOTT:** Your Honor, if it --

9           **MR. HOWELL:** That's okay from ATI's prospective.

10          **THE COURT:** Okay, Ms. Prescott?

11          **MS. PRESCOTT:** We've been using at issue -- and one  
12 of the things that would help greatly with this is if ATI would  
13 supplement its interrogatory responses that requests its  
14 contentions concerning what project it contends that NEXTracker  
15 won and ATI lost because of misuse of -- alleged misuse of  
16 these trade secrets, as well an interrogatory that seeks  
17 identification of the project that ATI contends it won but had  
18 reduced profits on.

19               We've been asking them to supplement this so that we  
20 aren't having this confusing way of referring to this set of  
21 projects.

22          **THE COURT:** Okay, well, I'm not going to -- at this  
23 point, that's not an issue that's before me and I'm not going  
24 to deal with it.

25               I'm -- and I'm -- I'm actually intending this to be a

1 broader universe than only the -- I mean, I don't want limit it  
2 to only the projects that ATI says that it lost because of  
3 Mitchell or that it won, but had to reduce its profit margin  
4 because of Mitchell.

5 I want overlapping projects from June 2015, to the  
6 present. And I think -- and, Mr. Howell, is there a list of  
7 those projects that has been shared with the Defendants?

8 **MR. HOWELL:** There is, Your Honor. Those are the  
9 lists that we provided on June 19th and also on June 30th that  
10 I spoke of earlier.

11 **THE COURT:** Okay.

12 **MR. HOWELL:** And just -- just to provide -- just so I  
13 understand, Your Honor, when you said the "overlapping  
14 projects" -- my understanding of what we've been discussing is  
15 that they need to produce complaints from customers which  
16 include EPCs and developers who were involved in or related to  
17 these overlapping projects.

18 So in other words, if there's an EPC who is bidding  
19 an overlapping project and then there's a complaint to that  
20 EPC, they need to produce that; is that correct?

21 **THE COURT:** A complaint by that, you concede, right?

22 **MR. HOWELL:** Correct, yes. That's correct. Thank  
23 you. That -- sorry, I misspoke.

24 But that was my understanding. I just want to make  
25 sure it was clear.

1           **THE COURT:** Yes. Although, I'm -- I'm a little bit  
2 concerned about how they're going to -- I don't know how  
3 they're going to find that universe --

4           So in other words, you're saying if a particular EPC  
5 complained about a project that ATI had nothing to do with, you  
6 still want that complaint?

7           **MR. HOWELL:** I think it's relevant because E-P -- as  
8 Ms. Prescott just stated, EPCs will develop many different  
9 projects.

10           And so complaints to the EPCs will certainly affect  
11 the EPC's willingness to use NEXTracker on any projects,  
12 including those that are overlapping.

13           **THE COURT:** Okay, so is there a way to determine  
14 who -- like the list of customers?

15           **MR. HOWELL:** Well, NEXTracker should have that. I  
16 mean, it -- it -- it's part of the -- of all things they have  
17 produced in this case, Your Honor, they certainly know who  
18 the -- who their customers are with respect to these  
19 overlapping projects because the quotes are directed many  
20 times -- well, all the time to either the EPC or the developer.

21           So they're going to know who the EPCs and developers  
22 were for each of these overlapping projects and they can easily  
23 search for a complaint with respect to or from those EPCs and  
24 developers.

25           And to be candid, Your Honor, that's the search that

1 ATI has done. It -- it -- and that's why we've produced  
2 575,000 pages of documents and they have not.

3 **THE COURT:** Okay, but not all those documents are  
4 complaints, I take it.

5 **MR. HOWELL:** Oh, certainly not. But with respect the  
6 ability to search for overlapping projects and correspondence  
7 about projects which -- which is going to be inherently from  
8 the -- external from the EPCs or the developers, that  
9 information can be fairly reasonably searched and obtained.

10 **THE COURT:** Okay, I want to make clear, though, that  
11 the time limitations still apply. So from June 2015 to the  
12 present.

13 So say there's a customer that has complained -- a  
14 customer on an overlapping project, but the complaint was in  
15 March of 2014, that does not need to be produced.

16 **MR. HOWELL:** Understood.

17 **THE COURT:** Okay?

18 **MR. HOWELL:** Thank you, Your Honor.

19 **THE COURT:** All right. All right --

20 **MS. PRESCOTT:** Your Honor, this is Ms. Prescott. If  
21 I could just get a final clarification as to the scope of  
22 customers that we're dealing with, my understanding is that,  
23 for purposes of this, Mr. Howell is focused on the customers  
24 related to the projects in his June 18th e-mail to me?

25 **THE COURT:** I thought it was June -- a little later



1 in June. Am I wrong about that?

2 **MR. HOWELL:** It was June 19th and June 30th.

3 **THE COURT:** June 19 and June 30th?

4 **MR. HOWELL:** And those are -- those are the exhibits  
5 to Mr. Hottinger's declaration I referenced earlier, by the  
6 way.

7 **MS. PRESCOTT:** And -- and the issue that I have with  
8 that, with respect to the June 30th, those are ones that  
9 NEXTracker did not necessarily win. So those may or may not be  
10 NEXTracker customers.

11 And, additionally, one of the complicating factors  
12 that we've had here is that there can be more than EPC that  
13 bids a project to a -- to an ultimate developer or owner.

14 And the people -- the EPCs that NEXTracker submits  
15 bids to can be different than the ones that ATI was submitting  
16 too.

17 So I'm struggling with the June 30th set of  
18 customers, how we define which ones of those are actually  
19 customers and overlapping customers, given that those are  
20 projects that NEXTracker did not win.

21 **THE COURT:** Well, I think the idea is, is that you  
22 will be -- if you can identify any of those people, I guess --  
23 I mean, they're not people; they are entities -- who are  
24 customers on other projects, then they would be included.

25 But if they're working for a developer that you're

1 not aware of, then I would say, you know, you can only do what  
2 you can do, right? It seems --

3 **MS. PRESCOTT:** Right. We will work with that  
4 guidance and work with ATI to identify that set of customers,  
5 if that's necessary.

6 And then the other point of clarification that I  
7 wanted to seek is, you know, we have comparable requests that  
8 we have made to ATI seeking communications about its customer  
9 relationships, about installation issues, about manufacturing  
10 defects.

11 And it was not clear to me whether Mr. Howell was now  
12 representing that ATI has already produced documents concerning  
13 customer feedback on those issues or not.

14 **THE COURT:** How does that relate to this Request for  
15 Production? I mean, I know that that was mentioned earlier,  
16 that he's -- it seemed to me that he was representing that  
17 there had been a subpoena to a particular woman that's  
18 requesting this -- these same types of documents. And it  
19 sounded to me like they were -- they had produced or were going  
20 to produce them.

21 But, Mr. Howell, what's your --

22 **MR. HOWELL:** Well, I --

23 **MS. PRESCOTT:** Your Honor, I submit -- to clarify my  
24 question --

25 **THE COURT:** Sure.

1           **MS. PRESCOTT:** Because it actually doesn't relate to  
2 the subpoena to Ms. Hugo, because there has been no response to  
3 that as of yet.

4           **THE COURT:** Okay.

5           **MS. PRESCOTT:** It relates to Request for Production  
6 directly to ATI that have been served seeking information about  
7 communications regarding customer relationships, inflation  
8 issues, and manufacturing defects.

9           They include the same type information that's sought  
10 here. And it -- we are being ordered to produce this  
11 information. I just want to confirm that this is a mutual  
12 production.

13           **THE COURT:** Well, I mean, your request isn't -- isn't  
14 before me.

15           But I will tell Mr. Howell that -- I assume, you  
16 know, that he will take into consideration my rule on -- my  
17 ruling on this Request for Production and assume, if they had  
18 intended to object or not produce documents in response to your  
19 request, that he might reconsider that position, based on this  
20 ruling.

21           All right, mister --

22           **MS. PRESCOTT:** Thank you, Your Honor.

23           **THE COURT:** -- Mr. Howell?

24           **MR. HOWELL:** Certainly, Your Honor. Understood.

25           **THE COURT:** Okay, because I really do try to be

1 consistent and I try to look at my prior orders to be  
2 consistent. And, certainly, if I'm inconsistent at some point,  
3 you should speak up and let me know.

4 But, okay, now, with respect to Request for  
5 Production 16, 17, and 18 --

6 **MR. HOWELL:** I think it was twenty, Your Honor.

7 **THE COURT:** I'm sorry.

8 **MR. HOWELL:** Sorry about that.

9 **THE COURT:** Twenty. Sorry, it's -- I have it written  
10 down here as 16, 17, and 20, relating to bid documents.

11 Ms. Prescott, I think that we -- I heard from  
12 Mr. Howell already with regard to those, and now I'm ready to  
13 hear from you.

14 **MS. PRESCOTT:** Thank you, Your Honor. So NEXTracker  
15 has produced what was agreed upon. And what was agreed upon is  
16 what is actually relevant in this case.

17 If you turn to Docket Item 191-4, these are the  
18 responses to Requests for Production 16, 18, and 20, that  
19 NEXTracker served in the January or February time period.

20 And you'll see, in the response to Request for  
21 Production Number 16, that the page 4, at 7, they responded --  
22 about halfway through the page, quote, pursuant to the party's  
23 February 3rd, 2018 agreement regarding the exchange of  
24 overlapping bid documentation, NEXTracker, on or around  
25 February 27th, 2018, will produce bid documentation related to

1 certain agreed upon projects.

2           So there's two issues here. First, there's the scope  
3 of the projects, and then there's the bid documentation, which  
4 ATI is now reclaiming to be all documents and e-mails related  
5 to projects.

6           With respect to the issue of the projects that are  
7 here, that's what we have spent almost -- a good six months,  
8 really until the e-mails that we received on June 19th and June  
9 30th, going back and forth with ATI, trying to get  
10 clarification as to what projects they were referring to. And  
11 these have shifted dramatically over time.

12           There are projects identified in the June  
13 spreadsheets that were never previously discussed between the  
14 parties as far as what projects might be at issue. But I think  
15 we've reached agreement on that.

16           We have that set that's set forth there. And for  
17 each of those projects that are identified in those two June  
18 spreadsheets, NEXTracker has produced the bid documentation;  
19 the documents memorializing NEXTracker's bid for those  
20 projects.

21           Bid documentation includes any response to a request  
22 for proposal, the bids or quotes themselves, estimator Excel  
23 spreadsheets that are used to generate the bid.

24           And then when a project was won, that bid  
25 documentation includes the contract that was negotiated and the

1 income statement.

2 With the respect to the response to RFPs -- Request  
3 for Production -- I'm sorry. Request for proposal; not request  
4 for production -- the bid documentation that NEXTracker has  
5 produced its responses to those proposals, not the -- the  
6 requests for proposals themselves, as Mr. Howell suggested  
7 earlier.

8 Sometimes that response is a presentation of product  
9 documentation; other times, it's just the bid -- the quotes.  
10 And sometimes with these quotes there's -- one, sometimes  
11 there's more than one, so that ATI can see, by seeing multiple  
12 quotes, the change in pricing strategy over time and when those  
13 changes occurred.

14 These estimator Excel spreadsheets that are part of  
15 the bid documentation then go into great detail about how each  
16 quote was generated. These are documents that we've produced  
17 that needed Excel files. If we printed them out, our  
18 production would be a lot larger, voluminously, of page count.

19 But we didn't print them out. We produced them  
20 (indisc.). And each of those spreadsheets typically includes  
21 more than a dozen individual paths or worksheets.

22 These worksheet include a change log that sets forth  
23 the change of (indisc.) between each of the different quotes as  
24 it changes over time; it specifies the estimated gross margins  
25 of the bid.

1           These estimators are exceedingly detailed. They go  
2 down and price out the individual one-quarter inch fasteners  
3 that are used on projects.

4           If a project was won, the bid documentation that's  
5 been produced then includes a contract. These contracts,  
6 although they might look like a form contract, many of them are  
7 happily negotiated and include different terms, not only will  
8 it in price, but schedules and warrantee and other terms and  
9 conditions.

10           And then, finally, we have produced a per-project  
11 income statement. NEXTracker has produced what was agreed back  
12 in February. This is a bid documentation; the documents  
13 memorializing NEXTracker's bidding process from the projects  
14 that overlap.

15           This is also what is relevant in this situation.

16           The -- the e-mails here that we were referring to  
17 earlier, the Exhibit 1 to my declaration that Mr. Hottinger  
18 sent, it is referring to the production of bid packages. This  
19 is in the second to the last paragraph.

20           Mr. Hottinger says, "One item we did not discuss in  
21 detail yesterday was the date for identifying the overlapping  
22 project and then producing the bid packages."

23           A bid package is the material that you are providing  
24 that shows the bid. That's what we've produced and it wasn't  
25 until this summer that that then got expanded to email. This

1 is also evidence by each side on production. The parties  
2 agreed to make this exchange of bid packages in late February.  
3 (indisc.) February production didn't include emails. It  
4 included bid packages.

5 And so I think the issue really is we've fulfilled  
6 our commitment that we agreed and this is what's really  
7 responsive. The email about the project generally, it's not  
8 proportional to the needs of the case. You know, there is  
9 email talking about pricing. That gets memorialized in these  
10 quotes. It gets memorialized in the contracts in theory.

11 **THE COURT:** I think though, Ms. Prescott -- and maybe  
12 I'm wrong about this, Mr. Howell, but you can correct me if I'm  
13 wrong. I think part of the issue though is getting to the why  
14 that bids may change over the course of the negotiations and I  
15 think that's what the Plaintiffs are trying -- or the Plaintiff  
16 is trying to get at. Am I wrong about that, Mr. Howell?

17 **MR. HOWELL:** No, Your Honor. That's correct and if I  
18 may, that's exactly correct. And just a quick contrast, if I  
19 may, Your Honor. In our reply in Mr. Hottinger's declaration  
20 at Docket 215-1, we attached a few emails there. And Docket  
21 215-2 and 3, if you compare those documents -- and these are  
22 emails that do discuss the why, Your Honor. This is -- this,  
23 again, was produced by Defendants' prior counsel but this is  
24 the one. I'm looking at 215-2. There, again, Mitchell  
25 disclosed ATI's benchmark pricing to NEXTracker -- a NEXTracker



1 vice president. This was three months after he left his  
2 employment with ATI.

3 If you look also at Exhibit 2 -- Exhibit M -- I think  
4 it's Docket 215-3 -- this is where Mr. Mitchell discloses -- if  
5 I recall, this is the one -- he did. He said -- the last  
6 paragraph of Mr. Mitchell's email in 215-3. He goes through  
7 all the bases and the details of ATI's sales strategy and its  
8 value proposition. In the last line, "I think if we can attack  
9 this aspect with data and reasonable figures for  
10 labor time to replace, et cetera, then we can really  
11 dismantle the basis for the ATI long-term O&M  
12 argument."

13 That's the why and that's what we're looking for and  
14 you contracted with what Ms. Prescott claims is relevant and  
15 that's Exhibit N. It's 215-4, I believe, the purchase order  
16 agreement. There's nothing there. The next exhibit, the  
17 quote, there's nothing there. I mean, the why isn't in any of  
18 those documents. The only why that we've received, we received  
19 from prior counsel and that's the real problem that we have.  
20 We need to get to the why.

21 **THE COURT:** Okay.

22 **MS. PRESCOTT:** Your Honor, may I address the why?

23 **THE COURT:** Sure.

24 **MS. PRESCOTT:** First of all, I want to clarify that  
25 the documents that Mr. Howell just pointed to were produced by

1 Fish & Richardson in February, not by prior counsel. So that  
2 is part of the production that we have made and we made that  
3 production in response to NEXT -- I'm sorry -- in response to  
4 ATI's other request for production -- request for production  
5 that sought information about how NEXTracker was competing  
6 against ATI.

7           We made it about NEXTracker's efforts to counter  
8 ATI's value proposition and in particular, its O&M. To the  
9 extent that there are emails regarding the why about  
10 competition related to ATI, those documents are being searched  
11 or have already been produced. The issue is that this request  
12 is asking for all correspondence related to these projects  
13 regardless of whether ATI's value proposition is at issue.

14           And, additionally, the estimator addresses in large  
15 part the why. The estimators go into great detail about the  
16 cost and the changed assumptions between different quotes and  
17 why these changes are being made. The assumptions are being  
18 called out there. So between the estimators and email that is  
19 responsive to other requests, the why is being addressed.

20           **THE COURT:** Okay. Well, let me -- I mean, I guess  
21 I'm a little bit intrigued by, I guess, these things that were  
22 mentioned by Peter Wheale, W-h-e-a-l-e, at his deposition, that  
23 there's a box folder for all projects. Would you tell me a  
24 little bit about what's contained in the box folder,  
25 Ms. Prescott?

1           **MS. PRESCOTT:** Certainly, Your Honor. Those are the  
2 bid documentations that we have produced to ATI. It's the  
3 response to their request for proposal. It's the estimators.  
4 It's the quote and in some instances, it is shipping labels and  
5 layouts, the documents that Mr. Howell was contending are  
6 irrelevant and he does not want produced but we have gone  
7 through and produced the folder that relates to the bidding of  
8 each and every one of these projects that are at issue that is  
9 maintained in NEXTracker's box.com.

10           **THE COURT:** Okay. So in other words, you have  
11 already produced the box folder for all overlapping projects?

12           **MS. PRESCOTT:** Yes, the bid folder for all projects  
13 that are overlapping.

14           **THE COURT:** Okay.

15           **MR. HOWELL:** Your Honor, I'm not sure if there's a  
16 distinction between the bid folder and the box folder but what  
17 hasn't been produced, as we've heard is the email. And I'll  
18 just add, Your Honor, this price estimator spreadsheet -- I  
19 won't use the language that was used in the exhibit but there  
20 are no references to butt-kicking in the bid estimator  
21 spreadsheet. Nor are there references to ATI's benchmark  
22 pricing. Those are in emails and these emails were referenced  
23 in the complaint -- at least the butt-kicking email was which  
24 was before Fish & Richardson became involved and so they may  
25 have been also produced by Fish & Richardson but they were in

1 the amended complaint, the butt-kicking email was --

2 **THE COURT:** Okay.

3 **MR. HOWELL:** -- just to clarify that.

4 **THE COURT:** Well -- so, Ms. Prescott, is there a  
5 separate bid folder versus box folder or -- I mean, is there a  
6 central place where substantive emails regarding particular  
7 projects and bid proposals are kept with respect to any  
8 particular project?

9 **MS. PRESCOTT:** No, Your Honor, the box.com folder may  
10 occasionally -- the bid folder is a folder that pulls together  
11 the documentation related to the bidding process for a  
12 particular project that is then stored on box.com.  
13 Occasionally, emails are pulled into that folder but it is not  
14 a systematic process that the substantive emails are stored in  
15 a central location.

16 What is stored centrally is what has been produced.  
17 It's the bid documentation that reflects the change in the bids  
18 over time and how that has evolved, when their changes were  
19 made and then the estimators, why those changes were made, what  
20 the assumptions were for them.

21 **MR. HOWELL:** Your Honor, this is Mr. Howell. What --  
22 if I may? Please let me know when I can respond to that. I  
23 don't want to interrupt you or Ms. Prescott.

24 **THE COURT:** Go ahead.

25 **MR. HOWELL:** Sure. So thank you, Your Honor.

1           The location of the emails, we assume, is on the  
2 email server. I can let the Court know that that is how ATI  
3 searched for and produced these emails that the Defendants have  
4 had the benefit of for months now and have used in depositions.  
5 We searched our email server by project name and we searched  
6 for privilege and we produced them. And that's what we've  
7 produced and that's what the Defendants had the benefit of.

8           And we'd ask that they be required to do the same. I  
9 mean, that' -- this is discovery and we're trying to figure out  
10 the why and they can easily go -- without disrupting employees  
11 at NEXTracker, they can do a search of PST files -- their IT  
12 department can -- of the server and can produce these emails.  
13 It's not hard.

14           **THE COURT:** And that would -- from your perspective,  
15 that would satisfy you?

16           **MR. HOWELL:** I think it -- what would satisfy us is  
17 they do a reasonable search and they do a search for responsive  
18 emails for the projects, the overlapping projects here. Yes,  
19 that would satisfy us.

20           **MS. PRESCOTT:** Your Honor --

21           **THE COURT:** Yes.

22           **MS. PRESCOTT:** -- I just want to address two points.  
23 First, again, the whole way that we've been operating since  
24 February was that we were producing bid documentation, not  
25 emails. We've structured our discovery accordingly. Discovery

1 has been extended multiple times here. Then with respect to  
2 actually making a reasonable search for email, we can look  
3 through the box folders -- all the box folders for these  
4 projects and start -- and produce all email that relates to the  
5 overlapping projects that have been filed in these box folders.

6 **THE COURT:** I thought you already produced those. I  
7 thought you --

8 **MS. PRESCOTT:** We have produced those from the bid  
9 documentation. If they would like to -- us to expand that out  
10 from the bid and not just confine ourselves to the bid folder,  
11 that email related to the project more generally -- documents  
12 related to the project more generally and its development, not  
13 just the bidding process.

14 **THE COURT:** Okay. So what's the problem with doing a  
15 search of your emails, just generally, whether they're in the  
16 box.com folder or in some other repository?

17 **MS. PRESCOTT:** Your Honor, the projects that are  
18 overlapping are not confined to projects that Mr. Mitchell  
19 handled. In fact, I don't know that any of them are projects  
20 that Mr. Mitchell handled. They are not confined to projects  
21 that two or three salespeople handled. This is projects that  
22 were handled across the sales department within NEXTracker and  
23 so this is dealing with gigs and gigs of data.

24 **THE COURT:** Well, no, I understand it's probably  
25 going over a lot of data but that's the beauty of computers, is

1 they can do these searches. But I guess I see from the  
2 Plaintiff's perspective, it's not just things that Colin  
3 Mitchell was personally involved in. It's if he brought -- I  
4 mean, the idea is if he brought over information that he then  
5 shared with NEXTracker, any employee at NEXTracker or anybody  
6 that he shared that information with or if NEXTracker sort of  
7 just institutionalized somehow the information that he shared,  
8 then they could use it on every project.

9 And so it seems to me that these substantive emails  
10 regarding the overlapping projects certainly are relevant and  
11 ATI is representing -- and I think the problem is -- and  
12 perhaps I'm wrong, Mr. Howell, and clarify -- I'll ask you. I  
13 guess I'll just ask you. What was your understanding of bid --  
14 overlapping bid documentation?

15 **MR. HOWELL:** Sure, Your Honor. Our understanding was  
16 Mr. Brakley (phonetic) said it in his email, the email we  
17 talked about bidding, whatever that is, 204-2, documents  
18 related to project bids. That's what we understood it to be.  
19 That's what we produced and, Your Honor --

20 **THE COURT:** And it included email?

21 **MR. HOWELL:** Oh, of course, it did. And, in fact,  
22 Your Honor, we did the search of emails. Like we said, we  
23 searched by project name and we produced it and that's one of  
24 the reasons it took a little while to produce, as Ms. Prescott  
25 indicated earlier, is because it was a lot of information and

1 we were communicating that to the Defendants. I don't have it  
2 off the top of my head how many gigs we've produced but I can  
3 tell the Court it's about 575,000 pages and it -- I want to say  
4 it's, like, 200 gigs that we've produced in this case.

5 We've had to produce on hard drives, not through FTP  
6 sites because it's voluminous and it's big. In fact, Your  
7 Honor, I have the emails of it. I believe we've produced about  
8 73,000 pages of emails. I believe the Defendants have produced  
9 -- or I'm sorry -- not pages. We've produced 71,869 emails. I  
10 believe NEXTracker has produced about 3,354 emails, give or  
11 take. I obviously didn't count every single one but based on  
12 file extensions and how they were identified, that's the  
13 disparity of email production, if that helps the Court  
14 understand kind of what we've done and where we are in this  
15 case.

16 **MS. PRESCOTT:** Your Honor, I'd like to address the  
17 agreement that was reached back in February. Mr. Howell was  
18 not involved in the case at that time. He indicated to you  
19 earlier that he joined this case in May. The parties agreed  
20 that they would make their bid documentation production on  
21 February 28th or -- yeah, it was a leap year -- February 28th.  
22 The production that ATI made on that date did not include a  
23 single email. That was the bid documentation, the initial bid  
24 documentation production. That shows that the understanding of  
25 both parties at that point in time is that bid documentation



1 was not email. It was the documents memorializing the bid, the  
2 contract, the quote and the responses to reply to the proposal.

3 And now, a couple months later, ATI is asking that  
4 that agreement be thrown out the window because it chose to  
5 produce a bunch of the emails for that email was responsible to  
6 -- responsive to other requests for production at NEXTracker as  
7 the Defendants propounded.

8 **MR. HOTTINGER:** Your Honor, this is Mr. Hottinger.  
9 If I may say one thing. I (indisc.).

10 **MR. HOWELL:** Can I --

11 **THE COURT:** Mr. Hottinger, we're having a hard time  
12 hearing you. I know -- it sounds like you're out -- or we  
13 heard earlier you're out of the country. I don't know if you  
14 can get to --

15 **MR. HOTTINGER:** I -- can the Court hear me now?

16 **THE COURT:** A little bit. You're pretty muffled  
17 though. So speak slowly and clearly.

18 **MR. HOTTINGER:** Yes, Your Honor. I was a part of  
19 those discussions in January and February and my understanding,  
20 my belief is emails were absolutely part of the bid packages.  
21 We've never would have agreed not to produce emails on these  
22 overlapping projects.

23 **THE COURT:** And how is it though that -- I mean, a  
24 lot of time has passed since the production in February. I  
25 mean, I'm just wondering. Weren't you obligated to bring your

1 motion to compel sooner than you did or am I wrong about that?

2           **MR. HOWELL:** No, Your Honor. This is Mr. Howell. I  
3 can speak to that. I believe as a rule, we were not because  
4 what we've been told is that they would be producing documents.  
5 We were never told they weren't going to produce emails until  
6 their opposition was filed. It was always, we are searching  
7 for and will produce documents. We're searching for and will  
8 produce documents. We would have -- had we known this was the  
9 position they were going to take, we would have moved sooner  
10 because now we're -- we have fact discovery closing in three  
11 months and we're just now learning their interpretation of this  
12 agreement that didn't require them to produce anything except  
13 for "contracts and responses and requests for proposal." So,  
14 no, we don't believe so.

15           **THE COURT:** Do you still have requests for production  
16 available to you?

17           **MR. HOWELL:** I'm sorry, Your Honor?

18           **THE COURT:** I mean, have you used up all your limit  
19 on your requests for production? I'm just curious.

20           **MR. HOWELL:** Well, the parties have agreed -- when we  
21 got the last extension, we agreed there'd be no more written  
22 discovery served between the parties.

23           **THE COURT:** Oh, okay.

24           All right. I mean, I have to say this seems to me  
25 like a bit of a misunderstanding and so -- but I do think -- it

1 does seem to me that substantive emails regarding these  
2 projects are relevant and would have been responsive to the  
3 requests as they were originally propounded.

4 Now, did we -- was there an agreement with respect to  
5 the timeframe or are you still -- was it still documents from  
6 2013 to the present? Mr. Howell?

7 **MR. HOWELL:** I believe that it's just -- it's the  
8 emails that relate to these projects, the overlapping projects.  
9 I don't believe that they were being actively bid or pursued  
10 earlier than -- you know, in 2013. So I think June 2015 would  
11 be agreeable.

12 **THE COURT:** All right. So I'm going to --

13 **MS. PRESCOTT:** Your Honor.

14 **THE COURT:** Yes. Go ahead, Ms. Prescott.

15 **MS. PRESCOTT:** I just wanted to say that I agree with  
16 Mr. Howell that the second project defines the relevant time  
17 period as June 2015. So where it's reasonable and  
18 additionally, since we're rewriting the agreement, we just ask  
19 that ATI produce the things, that have been documentation since  
20 this was a mutual agreement and that does include every -- that  
21 they produce the email that went, like, to each of the products  
22 -- projects and, for instance, requests now, I guess, is every  
23 email, not just from a limited set of custodians or a subset of  
24 custodians and that ATI make that same production.

25 **THE COURT:** Okay. Well, ATI, why don't you tell me

1 what it is you've produced? Did you produce all substantive  
2 emails or what?

3 **MR. HOWELL:** I believe -- I have to look at my notes  
4 on this. It may take me a minute but I believe that we  
5 searched for -- all emails from the sales individuals, the  
6 engineering folks at ATI and I believe we also searched for the  
7 custodians of the marketing people and the executive team, if  
8 you will, at ATI. Essentially, we searched --

9 **MS. PRESCOTT:** Your Honor --

10 **MR. HOWELL:** -- the people who have -- as I recall  
11 and as I understand it, who have emails. We did not search the  
12 email of the person who works on the production line. I'm not  
13 even sure they have email but -- you know, company email, I  
14 should say but that was the nature of the search that we did.  
15 We went to -- I believe it was probably 20 or 30 individuals  
16 that we searched.

17 **MS. PRESCOTT:** Your Honor, if we could get a  
18 representation of that number of individuals, then we will make  
19 a similarly proportional search. We just ask that the order be  
20 reciprocal that the parties are making the same efforts on both  
21 sides.

22 **THE COURT:** All right. I have no problem making the  
23 order reciprocal.

24 Do you have any problem with that, Mr. Howell?

25 **MR. HOWELL:** No, I don't and I would say we believe

1 we've done that but we can -- we're happy to work with  
2 Ms. Prescott and the Defendants to help them understand what  
3 we've done but I think the number of emails that have been  
4 produced speak for themselves.

5           **THE COURT:** Okay. What I would like you to do is  
6 agree in advance to the scope of the search. Okay? And I  
7 always say this with a little bit of heartburn because I'm  
8 concerned that you won't be able to agree and will come back to  
9 me but, I mean, I think I've dealt with this before in cases  
10 that deal with a lot of electronic discovery and it's just  
11 extremely helpful if the parties can agree at the outset what  
12 the scope of the search is so that NEXTracker doesn't do this  
13 huge search that ATI then says, no, that's not what we wanted.

14           So I really want you to agree to the scope of the  
15 search in advance but generally I will order that both parties  
16 mutually reciprocally produce substantive emails relating to  
17 this set of overlapping projects which it seems to me everybody  
18 has now agreed on what those projects are and that the  
19 timeframe is essentially from June 2015 to the present.

20           Is that acceptable to you, Mr. Howell?

21           **MR. HOWELL:** Yes, Your Honor. Thank you.

22           The one -- I guess my only concern would be  
23 substantive email. I understand that the Court is trying to  
24 avoid, like we mentioned last time, producing emails that say,  
25 let's go meet for doughnuts or coffee or whatever. I get that.

1 My concern would just be that if we get some false positives in  
2 the production, we're okay with that because we have a strategy  
3 and a theory in the case and we don't want the Defendants being  
4 the ones who determine what is substantive and likewise, I  
5 don't think they want us to do that as well. And we haven't  
6 done that. We've been pretty open as far as I know from our  
7 searches of what we've produced and so that would be my only, I  
8 guess -- not concern but just -- I just wanted to put that on  
9 the record.

10 **THE COURT:** So you -- in other words, if you found an  
11 email that said, let's go meet for doughnuts and discuss this  
12 project, you produced it?

13 **MR. HOWELL:** Well, given the number of emails we  
14 produced, we didn't look at every single email before we  
15 produced them. We ran searches on the projects and we ran  
16 searches for privilege and we produced them.

17 **THE COURT:** Okay.

18 **MR. HOWELL:** That's what we've done and so it's --  
19 you know, is there an email that says, let's go meet for coffee  
20 and it doesn't even say the project but, you know, a project  
21 name is mentioned somewhere in the stream, did it get produced?  
22 I think it would have because it would have come up in the  
23 search and we would have produced it. We didn't look at every  
24 single email beforehand.

25 **THE COURT:** Okay. So in other words, you're relying

1 on the Defendants to determine whether or not they think the  
2 email is relevant or not. You just sort of did a -- I won't  
3 call it a "dump" but essentially it was a dump minus --

4 **MR. HOWELL:** No, we didn't do a dump. We did a  
5 reasonable search --

6 **THE COURT:** Sure.

7 **MR. HOWELL:** -- based on the project and these  
8 overlapping projects --

9 **THE COURT:** Right.

10 **MR. HOWELL:** -- and that's from custodians who we  
11 thought were involved and would have information and, like I  
12 said, they've used a fair amount of these in depositions so  
13 far. So --

14 **THE COURT:** Okay.

15 **MR. HOWELL:** -- you know -- yeah.

16 **THE COURT:** Let me just then -- I'll --

17 **MS. PRESCOTT:** Your Honor --

18 **THE COURT:** What? Go ahead, Ms. Prescott.

19 **MS. PRESCOTT:** In order to help the parties reach  
20 agreement in advance as to the scope of the search that  
21 NEXTracker will be producing, could you order ATI to identify  
22 to us the custodians and the search terms that it used because  
23 I think that would help us determine the reciprocal efforts?

24 **THE COURT:** I don't have a problem with that. Do you  
25 have a problem with that, Mr. Howell?

1           **MR. HOWELL:** No. We can -- certainly. We'll let  
2 them know what search -- or what custodians we search and what  
3 terms we use. That's fine.

4           **THE COURT:** Okay. So -- and I'll -- what I'll do,  
5 Ms. Prescott, is I will take out the modifier substantive.  
6 Obviously, you can withhold things based on privilege but  
7 anything you withhold needs to be included on a privilege log  
8 and I will order ATI to disclose to you essentially the search  
9 -- the reasonable search that it conducted as a starting point  
10 for the parties to agree what the reasonable search will be  
11 that NEXTracker will do. Okay?

12           **MS. PRESCOTT:** Yes, and to the extent that further  
13 reasonable searches required of ATI because, again, if this is  
14 a mutual search and we're not aware of what their search terms  
15 have been in the past, we want to make sure that both of us are  
16 on the same page.

17           **THE COURT:** All right. That's fine. I'll make --  
18 the order is reciprocal and I'm really hopeful the parties can  
19 agree on what's a reasonable search but that will be my order.  
20 So that takes care of the formal motion to compel that has been  
21 filed.

22           As per usual, I'm going to order ATI to draft the  
23 order, run it by Ms. Prescott, decide on the appropriate  
24 timeframe for production and submit it to me.

25           And so I'll start with you, Mr. Howell. How long



1 will it take you to prepare a proposed order?

2           **MR. HOWELL:** Your Honor, I think if we have -- let's  
3 see. Today is Thursday. If we have until the 21st to exchange  
4 with Ms. Prescott, I think that would be fine.

5           **THE COURT:** Okay. So I will order you to draft it  
6 and give it to Ms. Prescott by the 21st and then would you like  
7 about a week to try to come to an agreement? Is that  
8 acceptable to you, Ms. Prescott?

9           **MS. PRESCOTT:** Yes, so we can come to an agreement on  
10 the proposed order and submit it to the Court is reasonable.  
11 Thank you.

12           **THE COURT:** Okay. So you'll submit it to the Court  
13 by about -- let's -- I don't have a calendar in front of me but  
14 I think that means that it would be September 28th. All right.  
15 And -- so that takes care of that.

16           So the next issue that we have is the emails -- the  
17 email first with regard to the 30(b)(6) depositions -- and one  
18 thing I wanted to discuss first is, does either side have a --  
19 any heartburn if we docket these emails? The -- one was the  
20 email first that was sent to me on September 5th and then ATI's  
21 response set -- sent on September 12th.

22           **MS. PRESCOTT:** If I may --

23           **MR. HOWELL:** No problem with me.

24           **THE COURT:** I'm sorry. Let me first ask. Let's see.  
25 Ms. Prescott, do you have any problem with your email being

1 docketed?

2 **MS. PRESCOTT:** No, Your Honor.

3 **THE COURT:** Okay. And then, Mr. Howell?

4 **MR. HOWELL:** No, Your Honor.

5 **THE COURT:** Okay.

6 **MR. HOWELL:** Thank you.

7 **THE COURT:** All right. So where do we stand with

8 this at this point? It does seem to me that -- let's see.

9 30(b)(6) states ATI, "must designate one or more officers,

10 directors or managing agents or designate other

11 persons who consent to testify on its behalf and it

12 may set out the matters on which each person

13 designated will testify." Is Mr. Corio -- and I'll

14 -- for the court reporter, it's C-o-r-i-o. Is he going to

15 testify on all topics?

16 **MR. HOWELL:** This is Mr. Howell. Yes, Your Honor.

17 At this point, that's our intention and we've done that as a

18 courtesy. We've tried to work with the Defendants and -- yes,

19 that's correct.

20 **THE COURT:** Okay. Ms. Prescott, do you have -- I

21 mean, is there still an issue with respect to this -- these --

22 this 30(b)(6) deposition? I think it's going to take place

23 next week, right?

24 **MS. PRESCOTT:** Yes, Your Honor. The deposition is

25 scheduled for next week and there remains an issue. This

1 morning is the first time that ATI has confirmed that Mr. Corio  
2 is the designee for all 30(b)(6) topics. This is the first  
3 we're hearing it. Even in the email that they submitted to the  
4 Court yesterday, they did not make that representation. They  
5 said that he would be the likely designee.

6           Mr. Corio now is the designee on more than 47  
7 30(b)(6) topics and NEXTracker anticipates that it will need  
8 more than one day with him in a 30(b)(6) capacity to fairly  
9 examine ATI on the broad range of subject matter that's  
10 relevant to this case. If he's been designated on all topics,  
11 he's been designated to cover the full scope of the -- this  
12 case, liability issues and damages issues.

13           ATI has alleged that it has more than 20 categories  
14 of trade secrets and Defendants need to be able to go through  
15 those trade secrets with ATI to understand what those alleged  
16 trade secrets are and whether they are actually trade secrets.  
17 They have to go through Mr. Mitchell's work performance and  
18 history at ATI. The topics also relate to an explanation of  
19 detailed financial data, corporate relationships and business  
20 practices and the discussion of more than a hundred projects  
21 that are at issue.

22           We don't anticipate that this can be covered fairly  
23 with seven hours and so we would request additional time with  
24 ATI's 30(b)(6) designee given that there's one individual  
25 covering 47 different topics.

1           **THE COURT:** Mr. Howell?

2           **MR. HOWELL:** Sure. Thank you, Your Honor.

3           A couple of points in response. First of all, our  
4 obligation is to designate a witness. We've done that. We're  
5 not obligated to disclose the witness ahead of time but we've  
6 done that as a courtesy.

7           The second issue, Mr. Corio here is the founder of  
8 Array. We've already agreed to put him up as the 30(b)(6)  
9 designee and he's going to be deposed personally next week as  
10 well. I'm not even sure that the Defendants in a case like  
11 this when the designee is also going to be personally deposed  
12 are even entitled to more than seven hours but we've offered  
13 him for 14 in the interest of compromise, to be frank. We  
14 could have cited some cases and made the argument that they  
15 only get seven hours with Mr. Corio, period because Mr. Corio  
16 is the founder of ATI and he is -- it's not a publicly traded  
17 company and -- but we've offered 14.

18           Now, before the deposition even occurs, they're  
19 asking for more time and, frankly, this is procedurally  
20 improper. There's case law -- I'll read the Court one. It's  
21 *Malik versus Trustees of Boston College*. The citation there is  
22 208 FR.d 23 and there the Court held that the -- I'll read it.

23           "The better practice is for the deposition to go  
24 forward to determine how much is able to be covered  
25 in the seven hours and then if additional time is

1           needed for counsel to stipulate to extend the  
2           deposition. If the parties cannot reach a  
3           stipulation, then Court intervention may be sought."

4           It's just this is premature and I wish we could fully  
5   brief this issue but at this point, we don't know how much  
6   they're going to be able to cover and they certainly should not  
7   be entitled to these serial deposition hours where the time  
8   just piles up. And we cited some of these cases in our email  
9   response back but they're not entitled to just hours and hours  
10   of deposition. That is incredibly burdensome on the witness  
11   and it gives them multiple bites at the apple.

12           And so we would request that this issue just be  
13   tabled. There's no reason to even address it right now. We've  
14   offered Mr. Corio for 14 hours even though I think an argument  
15   could be made he was only -- he could have only been designated  
16   for seven and if they think they need more time, they can go to  
17   the Court and ask for it if they weren't able to cover the  
18   issues they needed to cover in the deposition. That's the  
19   better practice, as the one Court called it and that's what  
20   should be applied here.

21           **THE COURT:** Mr. Howell, have you taken any 30(b)(6)  
22   depositions yet on --

23           **MR. HOWELL:** We have --

24           **THE COURT:** Not you personally but the Plaintiff.

25           **MR. HOWELL:** I'm sorry, Your Honor. I didn't mean to

1 cut you off. I'm sorry.

2 **THE COURT:** That's okay. Has the Plaintiff taken any  
3 30(b)(6) depositions or have any been set?

4 **MR. HOWELL:** No, we have not and we've actually never  
5 gotten dates for 30(b)(6) but that's -- we also obviously  
6 haven't had the documents we would have needed. In the last 30  
7 days, we've received financial documents and now we're  
8 presumably going to be receiving emails. So we have not taken  
9 any 30(b)(6) depositions yet.

10 **THE COURT:** Okay. All right.

11 **MS. PRESCOTT:** Your Honor, can I address just a  
12 couple points of clarification regarding Mr. Corio? I  
13 understand that they have 14 hours reserved with him for next  
14 week. My initial question is whether those 14 hours are -- can  
15 be made available entirely in his capacity as ATI's corporate  
16 representative and then that we could have ongoing availability  
17 reserved for him so that to the extent additional time is  
18 needed to be able to fairly examine ATI on the topic, that time  
19 is available.

20 We've struggled to get deposition dates in this case.  
21 A month ago ATI unilaterally cancelled the scheduled 30(b)(6)  
22 deposition. They did that because they were delayed in their  
23 own document production. In the past three weeks, ATI has  
24 increased its document production by 50 percent and it was  
25 conveyed to me earlier this week that it anticipates producing

1 still further documents this week that are relevant to those  
2 30(b)(6) depositions scheduled for next week.

3           **THE COURT:** Okay. Let me ask what exactly you're  
4 asking. Are you suggesting that you have some flexibility in  
5 terms of if you have additional -- like if you don't finish  
6 with your 30(b)(6) deposition the first day, you'd like to  
7 continue that on the second day and still be able to call him  
8 as a personal -- in his personal capacity at a later date?

9           **MS. PRESCOTT:** Your Honor, we request that we begin  
10 with his 30(b)(6) deposition. If topics are outside of the  
11 scope, they can object and we can ask the question in his  
12 personal capacity. We don't need to schedule a separate day  
13 specifically for his personal capacity but then that he  
14 continue to be able not just on Thursday of next week but also  
15 on Friday and that we have set days reserved on Saturday or  
16 Sunday as is necessary to complete a fair examination.

17           I'm hopeful that we can complete it over the course  
18 of two, two and a half days but I don't know that until we are,  
19 as Mr. Howell said, there but we want to have the time reserved  
20 because of the difficulties that we have encountered in  
21 scheduling this 30(b)(6) deposition as we could have raised  
22 this issue earlier if we had known that Mr. Corio was the  
23 designee on all 30(b)(6) topics but we didn't receive that  
24 confirmation until this telephone call.

25           **THE COURT:** All right. Mr. Howell, what's your

1 response? And I'll just -- at the very beginning, I'm going to  
2 say I'm not inclined to order Mr. Corio to sit for anything  
3 beyond the 14 days that he's committed to right now -- 14  
4 hours, sorry, 14 hours but -- because it will probably feel  
5 like 14 days at the end of those 14 hours. But I do want to  
6 know if you want to have very strict lines drawn between  
7 30(b)(6) and individual capacity or if you're willing to be a  
8 little flexible on that.

9 **MR. HOWELL:** Your Honor, I mean, under the rule, Rule  
10 30, they're entitled to seven hours with the corporate designee  
11 and they're entitled to 30 hours with an individual and --

12 **THE COURT:** You mean seven. Seven.

13 **MR. HOWELL:** I'm sorry, seven. Thank you. Oh, man,  
14 that would also -- it might feel like 30 as well, right?

15 **THE COURT:** Right.

16 **MR. HOWELL:** But -- and that's our position right  
17 now. That's where we are. That's what they're entitled to  
18 under the rules and will be willing to be a little flexible?  
19 Sure. But can I sit here right now without knowing how it's  
20 going to go, how flexible we're going to be? No, I can't. I  
21 mean, I can't commit to that but what I can commit to is  
22 Mr. Corio will be available for seven hours as a designee and  
23 for seven hours personally. We're willing to work with them  
24 and to consider flexibility but I'm not sure exactly what the  
25 limits are of what Ms. Prescott is requesting right now because



1 we haven't gone into the deposition and taken it.

2           And certainly we would object -- I know the Court  
3 already said limit it to 14 but this is the first we've heard  
4 of Saturday and Sunday. I don't even know if Mr. Corio is  
5 available and we're not agreeable to that.

6           **THE COURT:** Okay. No, I'm not going to order that.  
7 So at this point, this is what I'm going to rule. The  
8 deposition obviously will go forward. I'm encouraging the  
9 parties to try to be a little reasonable with each other and  
10 little flexible with each other to -- I mean, it would be great  
11 if you could finish his deposition, both 30(b)(6) and  
12 individual capacity, in the 14 hours that have been allotted.

13           If that's not possible, you can come back to the  
14 Court and ask for additional time but I will -- I don't -- I'm  
15 not all that inclined to -- well, I just really would like the  
16 parties to try to be reasonable with each other in working out  
17 an agreement in terms of additional time. Obviously, whatever  
18 I order for the Defendants in terms of taking the 30(b)(6)  
19 deposition of ATI, again, it's likely to be reflected in  
20 whatever is needed and ordered on the other side, on the flip  
21 side.

22           So what goes around comes around. Please be  
23 reasonable with each other and try to -- if you need a couple  
24 more hours on the 30(b)(6) and couple fewer on the individual,  
25 it would be nice if you could just do the whole ball of wax in

1 the two days that have already been scheduled. But if you  
2 can't reach an agreement, you can submit it to me. You can  
3 submit it to me -- I mean, you can do it by full-blown  
4 briefing.

5           There's been a lot of discovery disputes in this case  
6 and a lot of full-blown briefing. I would guess by now it's  
7 getting somewhat expensive but you can also -- I suppose not  
8 doing -- not do it by briefing but I will want -- if you need  
9 additional time, I will want to see the deposition and to see  
10 whether I feel like you used your time efficiently in terms of  
11 taking those depositions and whether you were reasonable with  
12 each other.

13           So at this point, I'm not going to order anything  
14 different than what's already going to take place but I'm not  
15 giving any assurance to either side that I either will order  
16 further deposition testimony or not but it will depend somewhat  
17 on how the deposition goes and, again, I just encourage the  
18 parties to be reasonable with each other.

19           Okay. Now, with respect to this other email that we  
20 received -- I think it was yesterday -- this is an email sent  
21 by Mr. Jackson with regard to a number of subjects. One, it  
22 has to do with NEXTracker documents -- or ATI had in its  
23 possession documents relating to NEXTracker that were not  
24 produced in a timely manner. The second issue had to do with  
25 documents that were produced without metadata and the third

1 issue had to do with getting possible dates for ATI's executive  
2 chairman Brad Forth.

3           Okay. Mr. Howell, you obviously probably just -- I  
4 don't know. Hopefully you've seen this email. I'm sure you're  
5 seen it and, again, I would like to docket this. How do you  
6 feel about that, Ms. Prescott?

7           **MS. PRESCOTT:** That's fine, Your Honor.

8           **THE COURT:** Okay. And then -- so, Mr. Howell, what  
9 are your thoughts with respect to the things that were raised  
10 in this email?

11           **MR. HOWELL:** Sure. Thank you, Your Honor.

12           As far as docketing goes, obviously we did not submit  
13 a response. To be perfectly candid, we weren't sure how the  
14 Court felt about getting these emails the day before -- you  
15 know, multiple emails and this email the day before the hearing  
16 raising additional matters. It would be nice if we had a  
17 fulsome opportunity to respond in writing but I can address  
18 them here.

19           With respect to the first issue, Your Honor, this  
20 possession of NEXTracker documents. We had a meet-and-confer  
21 about this. The Defendants wrote us a letter. We met and  
22 conferred and the meet-and-confer call was very short. My  
23 understanding was it was about two minutes long and the  
24 question was asked, did we do a search? And we said, yes,  
25 we've done a reasonable search. We produced what was located

1 and that was that.

2 And then in response, we got this email from  
3 Defendants' counsel that had language like what's in  
4 Mr. Jackson's email, a complete and comprehensive search and  
5 produced all documents responsive to the same. We didn't  
6 renege. We said we did a reasonable search and this is far  
7 beyond -- this language is far beyond what was discussed and  
8 what we are obligated to do under the rules.

9 So to this first issue, have we conducted a search  
10 and have we produced the documents? We have and we've told the  
11 Defendants that. So we're not sure exactly what they're going  
12 for here other than trying to build a record. But we have done  
13 it.

14 The second issue, Your Honor, metadata, my  
15 understanding is this issue was overlooked or not addressed  
16 during the call and I believe Mr. Hottinger sent an email  
17 saying, we're going to look into this. This is before --  
18 Mr. Hottinger's email was before this -- Mr. Jackson's email to  
19 the Court and it said, we're looking into this and we're not  
20 intending to withhold metadata and we're investigating this and  
21 we'll get back to them on it. There was no effort to hide  
22 metadata here but, again, that communication isn't part of the  
23 record that they submitted to Your Honor. So that's that  
24 issue.

25 Number three, with regard to Mr. Forth, we notified

1 them. I believe it was a few weeks ago by email that we were  
2 trying to get dates for Mr. Forth. This morning actually on  
3 the call I received a communication that Mr. Forth is generally  
4 available in October and we're happy to communicate that to the  
5 Defendants and I'm sure we can reach an agreeable date in  
6 October for his deposition to be taken. But I think that takes  
7 care of these three issues unless the Court has questions for  
8 me.

9 **THE COURT:** No. What I'm going to do is I'm going to  
10 hold these issues in abeyance basically and ask the parties to  
11 do further meet-and-confer and try to work them out. I'm  
12 hopeful that you can work out certainly a date for Mr. Forth's  
13 deposition. Is he here in New Mexico?

14 **MR. HOWELL:** Sometimes.

15 **THE COURT:** Okay.

16 **MS. PRESCOTT:** Your Honor --

17 **MR. HOWELL:** (indisc.) in New Mexico.

18 **THE COURT:** Okay. All right. And then --

19 **MS. PRESCOTT:** Your Honor, in the meet-and-confer  
20 process, should I request that ATI provide to NEXTracker what  
21 its reasonable search was for the documents related to  
22 NEXTracker that are in ATI's possession? Because we've had  
23 this what we've perceived as a flip-flop back and forth and I  
24 think having that specificity would be helpful. And can I also  
25 request that the Court order when that meet-and-confer will

1 occur? Because one of the issues has been that we have sent  
2 emails repeatedly on Mr. Forth's deposition and on the metadata  
3 and simply not received a response.

4 **THE COURT:** Well --

5 **MS. PRESCOTT:** We wanted to meet and confer about  
6 these issues but we were not obtaining that.

7 **THE COURT:** Okay. Well, is it true that  
8 Mr. Hottinger did response -- did respond with respect to the  
9 thing about the metadata?

10 **MS. PRESCOTT:** I have not received that response.  
11 Perhaps one of my colleagues did but I have not seen it. None  
12 of my colleagues in this room have seen it.

13 **MR. HOWELL:** And, Your Honor, this is Mr. Howell.  
14 Oh, Mr. Hottinger is on the line. Sorry, go ahead,  
15 Mr. Hottinger.

16 **MR. HOTTINGER:** Yes, Your Honor. During the meet-  
17 and-confer call, I told the Plaintiff that I may have  
18 overlooked their metadata email. I asked them to re-send it  
19 and that we would certainly provide the metadata.

20 **THE COURT:** Okay.

21 **MS. PRESCOTT:** He did not make the representation  
22 about the (indisc.) --

23 **THE COURT:** Okay. You know what? At this point --

24 **MS. PRESCOTT:** -- point the metadata meet and confer  
25 and he asked us to re-send the request which had already been

1 sent twice beforehand.

2           **THE COURT:** Okay. Ms. Prescott, we mostly did not  
3 catch that but let me just tell you at this point. I'm really  
4 not interested in who did what, when and who's right and who --  
5 I mean, at this point, I just want you to get your discovery  
6 done and I want you to be reasonable with each other. I've  
7 issued a lot of orders in this case regarding discovery and I  
8 would think by this time, you have some sense of the way I'm  
9 going to go on most of these issues.

10           Mr. Forth's deposition needs to be taken. Work out a  
11 date. The metadata, it sounds like they have no problem with  
12 producing it. Produce it within a reasonable period of time.  
13 And with respect to the other search things, yes, it's  
14 certainly reasonable and, again, with all electronic discovery,  
15 it is very helpful if you share it with the other side,  
16 particularly if it's in advance but even if it's  
17 retrospectively, what search you conducted and if there's a  
18 problem with the search, then we can talk about it.

19           But, yes, please be clear with each other. Please be  
20 reasonable with each other and please work it out. But at this  
21 point, I am not going to make any sort of particular ruling on  
22 this issue. It's helpful if the parties can pick up the phone  
23 and talk with each other and then if you want, after you've  
24 come to an agreement, you can solidify that agreement in  
25 writing but this is getting a little old, I will say, from the

1 Court's perspective. And so I urge you to work it out.

2 I'm not going to order a date by which you must meet  
3 and confer. Just do it within a reasonable period of time,  
4 within a week. I can't -- I mean, just work it out. So at  
5 this point, I'm not going to -- I'm just going to hold this  
6 particular email in abeyance. If down the road you cannot work  
7 it out, I encourage you -- well, these are things that I would  
8 expect that the parties could work out. So please do so. But  
9 I --

10 **MR. HOWELL:** Certainly, Your Honor.

11 **THE COURT:** All right. Is there anything further we  
12 need to discuss at this point?

13 Let me ask you first, Mr. Howell. Is there anything  
14 further?

15 **MR. HOWELL:** No, Your Honor. Just we want to thank  
16 the Court for the Court's time and attention to these matters.  
17 So thank you.

18 **THE COURT:** All right. And, Ms. Prescott, do you  
19 have anything further you'd like to raise?

20 **MS. PRESCOTT:** Not today, Your Honor.

21 **THE COURT:** All right. Well, thank you all for  
22 calling in. I appreciate it.

23 **MR. HOTTINGER:** Thank you.

24 **MR. HOWELL:** Thank you.

25 **MS. PRESCOTT:** Thank you, Your Honor.



THE COURT: Okay, bye-bye.

(This proceeding adjourned at 11:24 a.m.)

CERTIFICATION

I certify that the foregoing is a correct transcript from the electronic sound recording of the proceedings in the above-entitled matter.



September 20, 2018

Signed

Dated

*TONI HUDSON, TRANSCRIBER*